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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 19[illegible]

EDWARD J. BOLL, JR.,

Petitioner,

-vs-

STATE OF OHIO

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF OHIO, HAMILTON COUNTY

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QUESTIONS PRESENTED

1. Can a reviewing magistrate issue a search warrant based in part on hearsay if there is not a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished?

2. Can deputy sheriffs, who have a warrant to search only for a backhoe on the petitioner's property, go beyond the authority of that warrant and seize automobiles, parts of automobiles and tools?

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OPINIONS BELOW

The transcribed oral opinion of the Common Pleas Court overruling the petitioner's motion to suppress is reproduced in the Appendix at App. 1-2.

The opinion of the First District Court of Appeals of Ohio upholding the decision of the Hamilton County Court of Common Pleas is an unreported decision, Case No. C-810078 (1981), and is reproduced in the Appendix at App. 3-71.

The order of the Supreme Court of Ohio overruling the petitioner's motion for leave to appeal from the First District Court of Appeals is reproduced in the Appendix at App. 72.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3). Discretionary review was denied by the Supreme Court of Ohio on March 17, 1982 (App. 73.), and this petition for writ of certiorari is timely filed thereafter.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Search and Seizure clause of the Fourth Amendment to the Constitution of the United States which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves the Due Process clause of the Fourteenth Amendment which provides as follows:

> . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

On October 17, 1980, petitioner was arrested on four counts of receiving stolen property and one count of possession of criminal tools. Petitioner was subsequently arraigned on these charges and timely filed a motion to suppress the evidence. This motion was overruled by the trial court on December 23, 1980, and on January 8, 1981, petitioner entered a plea of no contest to all five charges. The trial court then imposed a sentence of one to ten years on each count

of receiving stolen property and six months to five years on the count of possession of criminal tools. Sentencing on all counts was to run concurrently. The petitioner filed a timely appeal raising the issues of illegal search and seizure alleging the issuing magistrate lacked probable cause to issue the search warrant and that the officers had gone beyond the authority of the search warrant in seizing items not named within that warrant.

In upholding the petitioner's conviction, the First District Court of Appeals acknowledged that the issues presented in the appeal were complex and searching (App. 11.). The Court, addressing the issue of probable cause to issue the warrant, noted that there was

sufficient supporting information provided to satisfy the conditions that the unnamed informant's statements were credible and his information reliable (App. 31-36.).

The Court then addressed the issue of whether or not the officers could seize items not listed in the search warrant and concluded that the officers' actions satisfied the requirements of a plain view warrantless seizure (App. 66.).

Petitioner's motion for support of jurisdiction to the Supreme Court of Ohio was overruled without opinion (App. 72.).

ARGUMENT

1. CAN A REVIEWING MAGISTRATE ISSUE A SEARCH WARRANT BASED IN PART ON HEARSAY IF THERE IS NOT A SUBSTANTIAL BASIS FOR BELIEVING THE SOURCE OF THE HEARSAY TO BE CREDIBLE AND FOR BELIEVING THAT THERE IS A FACTUAL BASIS FOR THE INFORMATION?

Where probable cause to issue a search warrant is concerned, an affidavit based in whole or in part upon hearsay information must conform to the standards prescribed by the United States Supreme Court in Aguilar v. Texas, 378 U.S. 108 (1964), and followed in Spinnelli v. U.S., 393 U.S. 410 (1969).

The test which must be applied when an informant is involved is set forth in Aguilar, at pages 114-115.

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, Jones

> v. United States, 362 U.S. 257, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime . . .'" (Emphasis added).

The underlying affidavit (App. 7-9.) clearly states that a "backhoe" or part thereof were located at 8709 Bridgetown Road, the home of the petitioner. The affidavit seeks to convey the impression that this information was provided by Edward

Bedel, but a more detailed reading of the affidavit reveals that "a subject" saw this item or items on Tuesday, December 7, 1980, and it is very clear that Mr. Bedel did not see the items at the petitioner's address listed on Bridgetown Road.

There was absolutely no attempt by the officers to establish that the subject was reliable or credible, and any attempt to satisfy this requirement by independent corroboration is woefully inadequate to establish a substantial basis for believing that there was a factual basis for the information furnished. Jones v. U.S., 362 U.S. 257 (1960); Draper v. U.S., 358 U.S. 307 (1959); State v. Gill, 49 Ohio St. 2d (1977).

There is nothing in the affidavit to establish that the informant or

subject was familiar with the size and shape of the backhoe. Indeed, the statement that a backhoe was on the premises of the petitioner is totally unsupported since it is revealed that the informant saw a "part" which "was yellow" and "had stickers removed that are the exact size used by the Tool Rental." The statement referring to sticker size is nothing more than conclusion which is unsupported by any measurements to establish "exact size."

Because the informant saw only "a part" and, without further information to demonstrate the informant's familiarity with a backhoe, the statement that the "size" of the backhoe was "480" again is strictly a conclusion unsupported by any evidence.

The First District Court of Appeals erroneously concluded that the affidavit was sufficient to demonstrate the informant's reliability as required by Aguilar because the Court mistakenly believed that the informant saw a backhoe. A closer reading of the affidavit shows that the informant saw only "a yellow part."

Since there were purported to be only seven of these types of backhoes within the area of Cincinnati, there is nothing contained within the affidavit to suggest the informant had any knowledge or experience with such an esoteric piece of equipment to the degree that he could tell the size and shape of a backhoe simply by looking at a "yellow part." There is ab-

solutely no foundation for the appellate court's finding that the unnamed informant's reliability had been established since the basis for his knowledge of backhoes could not possibly be inferred from the language of the affidavit.

Because nothing is known of the informant's knowledge of backhoes, it cannot be said that this informant is reliable; and in this instance reliability cannot be corroborated by the affiant's allegation that the petitioner's reputation was poor and that a case backhoe had been reported stolen by Mr. Bedel four and one-half months previous to October 7, 1980.

2. CAN DEPUTY SHERIFFS, WHO HAVE A WARRANT TO SEARCH ONLY FOR A BACKHOE ON THE PETITIONER'S PROPERTY, GO BEYOND THE AUTHORITY OF THAT WARRANT AND SEIZE AUTOMOBILES, PARTS OF AUTOMOBILES AND TOOLS?

The search warrant in this case (App. 74.) directed the officers to search for the backhoe or parts thereof and bring the items back to the magistrate.

In the list of items on the return of the search warrant (App. 75.) there is absolutely no mention of a backhoe or parts thereof, but there are listed numerous tools and automobiles which were not listed in the original search warrant.

It is the State's position that the seized items in this case were in plain view, but the search of the petition's home and place of business does not meet the requirements of

the plain view doctrine.

In order for the officers to lawfully seize items not named in the search warrant, it must be shown that the officers' initial intrusion which afforded them the opportunity to view the evidence was lawful; that the discovery of the evidence was inadvertent; and that the incriminating nature of the evidence was immediately apparent to the seizing authorities. Coolidge v. New Hampshire, 403 U.S. 433 (1971).

In Coolidge, this Court was careful to draw a distinction between a general exploratory search and seizing contraband in plain view:

> "Plain view alone is never enough to justify the warrantless seizure of evidence. The discovery of evidence must be inadvertent. If the initial intrusion is bottomed upon a warrant that fails to mention

> a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirements of warrants particularly describing the things to be seized." Coolidge at 463.

From a review of the facts in this case it is quite apparent that the officers were engaged in a general exploratory search. Immediately after the warrant was served, the petitioner's wife was told that the officers were looking for a backhoe which was "down in the high weeds" and yet the first location the officers searched was the garage area of the premises.

The officers went into the petitioner's garage and immediately began taking down serial numbers of the cars and calling that information into a computer center to determine

if the vehicles were stolen (App. 40 .). Then the officers searched every other building on the property as well as a large portion of the grounds, and in every case where they found a motor vehicle, they wrote down the serial number and radioed that information to the computer center for a status report (App. 40.). Twenty cars were found on the premises and four were seized.

As admitted by Detective McGaha, none of the items seized from the petitioner's property resembled a backhoe (App. 41.). The officer further admitted that there was nothing about the seized items which was inherently incriminating as in heroin or marijuana (App. 43.).

It is painfully and frightenly clear that the officers in this case

were using the warrant for a backhoe as an excuse to search for evidence on the cars and tools located at the petitioner's home and place of business.

In U.S. v. Gray, 484 F.2d 352, (6th Cir. 1973), cert. denied 414 U.S. 1158, a state trooper served a warrant upon the defendant directing the seizure of alcoholic beverages. While there, the state trooper removed rifles from the defendant's closet, copied down the serial numbers from them, and later ran that information through a computer center and found that the guns were stolen. Upon learning that the guns were stolen, the officer obtained a second search warrant and returned to the defendant's house and seized the guns.

The Court held that the trooper's act in copying down the serial numbers constituted an illegal seizure and any evidence gleaned from this act was suppressed. In acknowledging the three pronged test established for the plain view doctrine in Coolidge, supra, the Court observed that it was not readily apparent that the guns were contraband.

In like manner, the action of Deputy McGaha in copying down serial numbers of cars on the petitioner's property constituted an illegal seizure because it was not readily apparent that the items seized were contraband. Petitioner not only lived at the location where the search warrant was executed, he also had his place of business there. Petitioner established he had an auto

body repair business which certainly justified the presence of automobiles and automobile parts on his premises. If the petitioner was not in the auto business then the prosecution's argument that this was a "chop shop" operation would be sound and the seizure of the items in dispute would be justified. However, that is not the case.

Certiorari should be granted to resolve these important questions.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

May, 1982

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